

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon
Justice

PART 42

In the Matter of
ENERGY & ENVIRONMENT LEGAL INSTITUTE

INDEX NO. 101678/2016

- v -

MOTION DATE 8/2/2017

ATTORNEY GENERAL OF NEW YORK

MOTION SEQ. NO. 001

The following papers were read on this proceeding pursuant to CPLR article 78:

Notice of Petition/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law----- No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits ----- No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits ----- No(s). 3

The petition is determined in accordance with the Decision, Order, and Judgment of this court, attached.

Dated: March 8, 2018

[Signature] JSC
HON. NANCY M. BANNON

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: PETITION IS: [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X

In the Matter of
ENERGY & ENVIRONMENT LEGAL INSTITUTE

Petitioner,

Index No. 101678/2016

v

DECISION, ORDER, and
JUDGMENT

ATTORNEY GENERAL OF NEW YORK,

Respondent.

MOT SEQ 001

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, the petitioner seeks to review the respondent's determinations dated September 22, 2016, and September 23, 2016, denying the petitioner's requests under the Freedom of Information Law (Public Officers Law § 84, et seq.) to produce certain agency records. In that determination, the respondent invoked several statutory exemptions and common-law privileges, which he contends excuse him from disclosing and producing those records, including the attorney-client privilege in connection with records referable to his communications with, and requests for advice from, outside counsel.

By order dated June 21, 2017, the court directed the respondent to produce, for in camera review, 16 of the subject documents that are alleged to be exempt from production by virtue

of the attorney-client privilege. The respondent has done so, and the court has reviewed those documents.

The petition is now denied and the proceeding is dismissed.

II. BACKGROUND

In 2015, the Office of the Attorney General (AG) began an investigation to determine whether public statements made by the ExxonMobil Corporation to its investors and consumers violated New York business, securities, and consumer statutes. Specifically, the AG sought to determine whether such statements mischaracterized the commercial impact of climate change based on ExxonMobil's own research of the matter. On March 30, 2015, and May 5, 2016, while this investigation was pending, the petitioner submitted requests to the AG to produce documents pursuant to the FOIL, focusing on email correspondence containing key terms such as ExxonMobil's name. The Office of the AG denied the request based on exemptions set forth in the FOIL and common-law privileges. The petitioner administratively appealed the denial to an Assistant Solicitor General, who affirmed the initial determination that the records were exempt from disclosure pursuant to both FOIL and common-law privileges.

III. DISCUSSION

"While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential." Matter of Fink v Lefkowitz, 47 NY2d 567, 571 (1979). When denying a FOIL request, a state agency must "state, in writing, the reason for the denial of access." Matter of West Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882, 884 (2009). If the requesting party administratively appeals the denial, the agency's appeals officer must also provide written reasoning for upholding the denial. See id.

"[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable."

Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 109 AD2d 92, 94 (3rd Dept. 1985), affd 67 NY2d 562 (1986); see Matter of Prall v New York City Dept. of Corrections, 129 AD3d 734 (2nd Dept. 2015); Matter of New York Comm. for Occupational Safety & Health v Bloomberg, 72 AD3d 153 (1st Dept. 2010). Rather, upon judicial review of an agency's determination to deny FOIL requests, the agency must show "that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital

Newspapers Div. of Hearst Corp. v Burns, supra, 67 NY2d at 566.

Where, as here, a party challenges an administrative determination to withhold or redact documents that are responsive to a FOIL request, the proper procedure is to commence a CPLR article 78 proceeding, where the agency's burden to articulate a particularized and specific justification for denying access may be satisfied through the submission of the responsive documents with a privilege log. See Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation and Fin., 141 AD3d 997 (3rd Dept. 2016).

Here, the AG properly invokes the statutory exemptions set forth in Public Officers Law §§ 87(2)(e)(i) (law enforcement exemption), 87(2)(a) (exempt by virtue of another statute), and 87(2)(g) (inter- and intra-agency material exemption).

A. Law-Enforcement Exemption

Agency records are exempt from disclosure if permitting such disclosure would "interfere with law enforcement investigations." Public Officers Law §87(2)(e)(I). The prevention of such interference requires that "violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information." Matter of Fink v Lefkowitz, supra, at 572. Moreover, "the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or

threatened investigations nor to use that information to construct a defense to impede a prosecution." Id. The respondent, by submitting a privilege log, met its burden here of showing "that the records withheld were compiled for law-enforcement purposes." Matter of Free Market Envtl. Law Clinic v Attorney Genl. of N.Y., ___ AD3d ___, 2018 NY Slip Op 01542, *1 (1st Dept., Mar. 8, 2018); see Matter of Leshner v Hynes, 19 NY3d 57 (2012); Matter of Loevy & Loevy v New York City Police Dept., 139 AD3d 598 (1st Dept. 2016).

The respondent has broad investigatory powers. See People v Grasso, 54 AD3d 180 (1st Dept. 2008). Consequently, it would be an improvident exercise of discretion to question "what extent, if any, respondent's decision to initiate the investigation" to which the subject emails were related "was motivated by political considerations." Matter of Free Market Envtl. Law Clinic v Attorney Genl. of N.Y., supra, *1; see Salnikova v Cuomo, 93 AD3d 445 (1st Dept. 2012).

B. Exemption In Accordance With Other Statutes

An agency retains discretion in disclosing records that "are specifically exempted from disclosure by state or federal statute." Public Officers Law §87(2)(a). Here, the respondent determined that some records constituted attorney-client communications, and thus may be exempted from disclosure by

virtue of CPLR 4503. Upon its in camera review of those documents, the court agrees that the respondent satisfied its burden of showing that those records are exempt from disclosure, inasmuch as they contain opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making. See Matter of Spring v County of Monroe, 141 AD3d 1151 (4th Dept. 2016); Matter of Sell v New York City Dept. of Educ., 135 AD3d 594 (1st Dept. 2016); see also CPLR 3101(c) (exempting attorney work product from disclosure). Moreover, the exemption applies whether the attorney providing the opinions, ideas, or advice is a government attorney or outside counsel retained or engaged by the respondent. See Matter of Spring v County of Monroe, *supra*.

C. Inter-Agency and Intra-Agency Exemption

Public Officers Law § 87(2)(g) provides that an agency may deny access to records or portions thereof that "are inter-agency or intra-agency materials" and are not statistical tabulations or data, instructions to staff that affect the public, final agency or policy determinations, and external audits. Moreover, "[o]pinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law (FOIL) as intra-agency materials do not lose their exempt status simply because they are prepared for the

agency, at its request, by an outside consultant." Matter of Xerox Corp. v Webster, 65 NY2d 131, 131 (1985). The respondent met its burden of establishing that the records that it denominated as inter-agency and intra-agency materials are indeed exempt from disclosure under that category.

IV. CONCLUSION

Accordingly, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

Dated: March 8, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON